

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

KRAFT FOODS GLOBAL, INC., THE  
KELLOGG COMPANY, GENERAL  
MILLS, INC., and NESTLÉ USA, INC.,

Plaintiffs,

v.

UNITED EGG PRODUCERS, INC.,  
UNITED STATES EGG MARKETERS,  
INC., CAL-MAINE FOODS, INC., ROSE  
ACRE FARMS, INC.

Defendants.

No. 1:11-cv-08808

Judge Steven C. Seeger

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**JOINT MOTION TO PERMIT USE OF CONFIDENTIAL  
AND HIGHLY CONFIDENTIAL MATERIAL AT TRIAL**

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Plaintiffs Kraft Foods Global, Inc., the Kellogg Company, General Mills, Inc., and Nestle USA, Inc. (“Kraft Plaintiffs”), joined by Defendants United Egg Producers, Inc. (“UEP”), United States Egg Marketers, Inc. (“USEM”), Cal-Maine-Foods, Inc. (“Cal-Maine”), and Rose Acre Farms, Inc. (“Rose Acre”) (collectively, “Movants”), by their attorneys, move under the “Case Management Order No 10 (Protective Order)” previously entered by the MDL Court, to clarify that the Protective Order permits the disclosure at trial of material designated as Confidential or Highly Confidential, subject to the right to ask the Court, on an exceptions basis, for confidential treatment for particular documents, if needed.

During discovery in this case, parties and third parties designated documents they produced and deposition testimony as “Confidential” or “Highly Confidential” under the Protective Order. The

Protective Order permits the parties to display these materials to the Court, jurors, and court personnel. Movants ask the Court to make clear that the parties may display such materials in open court in the upcoming trial without excluding from the courtroom individuals not subject to the protective order and without limiting public access to the courtroom. In the event the parties believe a particular document or testimony requires confidential treatment, on an exceptions basis, they will, after meeting and conferring, advise the Court of any issues regarding public display of the document or testimony.

In further support of this motion, the Movants state as follows.

1. On February 12, 2009, the MDL court entered the “Case Management Order No. 10 (Protective Order).” Dkt. 50. That Protective Order permitted the parties to produce documents in the case subject to confidentiality restrictions. Several provisions of the Protective Order are relevant to this motion.

2. Paragraphs 5(b)(4) and 5(c) permit the disclosure of Confidential or Highly Confidential materials in connection with the trial of the case. As to Confidential material, Paragraph 5(b)(4) permits disclosure:

to this Court, or any other court exercising jurisdiction with respect to the Litigation, any appellate court(s), court personnel, jurors, alternate jurors, and qualified persons (including necessary clerical personnel) recording, taking or transcribing testimony or argument at any deposition, hearing, trial or appeal in this Litigation;

Paragraph 5(c) permits the same disclosure of Highly Confidential materials.

3. Paragraph 9 permits the parties to seek to modify or continue the Protective Order provisions in the event of trial. It states:

Confidential or Highly Confidential Documents and Materials at Hearing or Trial. Disputes arising as to the use of Confidential or Highly Confidential Discovery Material or information at trial or hearings will be resolved by the Court prior to the disclosure of such materials. In addition, no fewer than thirty (30) days before the date upon which the parties are directed to submit a Joint Pretrial Order in this Litigation,

the parties shall meet and confer to negotiate a proposal for Court approval addressing the treatment of material previously designated Confidential or Highly Confidential at trial. To the extent the parties fail to agree on a proposal addressing the use of such material at trial, they may submit alternative proposals to the Court for resolution.

The parties have not previously raised this issue with the Court. This motion reflects Movants' effort to submit a proposal to govern the use of designated materials at trial.

4. Paragraph 13 of the Protective Order gives this Court express authority, to the extent such authority is needed, to modify the Protective Order as needed. That paragraph states:

Nothing herein shall prejudice the right of the Parties to stipulate (subject to Court approval) or to move to amend or modify this Protective Order in the interest of justice. The court retains the right to allow disclosure of any subject covered by this Protective Order or to modify this Protective Order at any time in the interests of justice.

5. In the DPP and DAP trials, Rose Acre, UEP, and USEM indicated that the parties had reached out to third parties to obtain their agreement to the potential use of materials designated under the Protective Order at trial. The two prior trials took place without ever having to exclude from the courtroom individuals not subject to the provisions of the Protective Order.

6. The parties have already resolved confidentiality issues to many of the documents and depositions excerpts to be used in this trial. The parties have agreed to remove confidentiality designations as to the documents they produced, with certain limited exceptions that should not interfere with the presentation of evidence at trial. Specifically, UEP requests that to the extent any UEP audits or audit results are introduced, that the parties redact any audits or audit results related to non-conspirator parties and/or parties who have not given consent to waive confidentiality over these documents. In addition, the plaintiffs request that any proprietary formulations or recipes be redacted (for example, the precise specifications of Miracle Whip), and any analysis with respect to ingredient purchases unrelated to Eggs also be redacted (for example an internal presentation involving pricing and forecasts related to rice or meat). The parties will work together to identify any necessary

redactions, and will work with any third parties who identify any remaining confidentiality concerns. The Defendants expressly reserve the right to object to any redactions of Plaintiffs' documents that are overly broad .

7. Subject to the caveats in Paragraph 6, the Movants request that this party consent extend to documents authored or created by a party, or documents in which the party participated such that the same document would have also been under such party's custody or control, regardless of the entity that produced them. For example, Moark, a nonparty, produced many of the *United Voices* documents that were created by defendant UEP. By virtue of its authorship, UEP has the power to permit the disclosure of documents it created, even if it did not produce them in this litigation for whatever reason.

8. The parties also agree that documents and deposition testimony used in prior trials, and already presented in open court, no longer need to be maintained in confidence. The prior public disclosure resolved all the confidentiality issues.

9. In addition, the Movants have reached out to third parties that produced documents or provided deposition testimony that the parties have designated to advise them of the upcoming trial and to invite them to identify any materials previously designated under the Protective Order for which the third party desires to maintain confidential treatment. In some instances, these efforts to reach third parties relating to discovery conducted more than a decade ago have been unsuccessful. In addition to these efforts, Movants will provide notice of this motion to all service parties in the multidistrict litigation, along with the last known counsel information for each of the third party producers, as indicated on the certificate of service to permit them to advise the parties of any

confidentiality issues. The Movants' exhibit lists and witness lists (indicating deposition designations) are also attached hereto as Exhibit A.

10. The Movants agree that, with few if any exceptions, the documents produced in this case that will be used at trial no longer need to be maintained in confidence as that term was used in the Court's prior Protective Order. Discovery largely concerned conduct before 2008. More than fifteen years have since passed, and the documents and deposition testimony initially made subject to the Protective Order are no longer in need of protection. *See Neil v. Zell*, No. 08 C 6833, 2011 WL 843661, at \*7 (N.D. Ill. Mar. 3, 2011) (refusing to confirm confidentiality designation where one party indicated the records were several years old, and designating party did "not specify what information is still sensitive at this point in time"). *See generally Watkins v. Trans Union, LLC*, 869 F.3d 514, 523 (7th Cir. 2017) (observing that the "passage of time" frequently "render[s] obsolete" confidential information).

11. Movants request that this Court clarify that the Protective Order permits the use of documents in open court in the trial, notwithstanding the prior designation of those materials as Confidential or Highly Confidential. This Court's prior Protective Order permits the Court to modify the Protective Order in the interest of justice. In the event one of the parties believes a document may remain in need of protection from public disclosure, it will ask the Court to permit it to raise the issue as a particular document or deposition excerpt with the Court.

12. Finally, an issue may arise with exhibits used in cross-examination. The parties are not exchanging exhibits to be used in cross-examination and therefore they cannot raise any issues about whether the documents present confidentiality concerns. Movants request that the Court permit the parties to address these issues between direct and cross-examinations, or during a cross-examination, out of the hearing of the witness. In the exceptional circumstance in which a document

to be used in cross may present a confidentiality issue in good faith, the parties will raise it with the Court.

WHEREFORE, Movants respectfully request the Court to clarify that the Protective Order in this case permits the use of materials and testimony from the discovery phase of this case to be introduced at trial in open court subject to the right to request continued confidential treatment in the exceptional case where such treatment is warranted or where a third party objects to the use of the document in open court.

October 13, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of October, 2023, the foregoing Joint Motion to Permit Use of Confidential And Highly Confidential Material At Trial was electronically filed using the CM/ECF system, which will send notification of such filing to all CM/ECF participants registered to receive service in this action. I further certify that I caused the foregoing document, and all filings listed in this document, to be served via electronic mail on counsel for all parties on the multidistrict service list and last known counsel for third party producers.

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